

# While they are still alive

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Maximilian Steinbeis

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It has been more than two weeks since the last German evacuation plane took off from Kabul. What the Federal Republic left behind is a promise. To those people „for whom Germany bears special responsibility,“ the German government promised to „support them in their safe departure from Afghanistan.“ This promise does not only apply to the so-called *Ortskräfte* who worked for Germany in Afghanistan, but also to „people in particular need of protection“: human rights activists, judges, journalists, lawyers, artists, intellectuals, academics – people, in a word, who have probably already trusted the promises of the West for the most part and match the image interior ministers picture when they dream of an ideal asylum seeker (if that’s what they dream of at all). At the moment, most of these people keep scurrying from one hiding place to another in Kabul, so that the fulfillment of the German promise will not be made superfluous by the fact that the Taliban found them first.

It’s safe to say that time is of the essence, I suppose. Also, the promise comes with a limit: it only applies to people „whom the German government has identified as particularly endangered by the end of the military evacuation operation, and to whom we had held out the prospect of leaving with the *Bundeswehr*.“ The various federal ministries apparently keep lists, but only those who got in touch in time – that is, before Aug. 26, the date of the final withdrawal – get on them.

The deadline of 8/26 had not been communicated anywhere before, it seems. Two days ago, I spoke with Tilmann Röder of the Free University of Berlin, who has been advising the German Foreign Office for years on the promotion of the rule of law in Afghanistan and is a co-founder of the *Luftbrücke Afghanistan* initiative, which coordinates and sorts the calls for help from Kabul that arrive by e-mail. He knows of more than 1,300 people plus families who have missed this deadline, he told me. What will become of them, nobody knows.

Those who applied in time have been waiting all the longer for a signal from Berlin. The people in their hiding places in Kabul mostly do not even know if they are on any list in the first place. Tilmann Röder says he knows only of two or three cases where people have been contacted, among thousands. And even those have received no notice of what would happen to them.

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How does the Federal Government want to proceed with these people? What is the procedure? Who decides about them and their „particular need of protection“, and according to which criteria? Nobody knows. And with every day that passes without answers, the promise of the Federal Republic of Germany to the people for whom it „bears special responsibility“ becomes worth less. In two weeks, there will be federal elections. How many will be dead by then?

I have sent a list questions to the press office of the Federal Ministry of the Interior on Tuesday evening. So far, no answer.

The Federal Ministry of the Interior bears political responsibility for its actions. And if it does not take this responsibility, we, the citizens of the Federal Republic of Germany who are entitled to vote on September 26, will have to do it. If we don't?

Well, that's on us then.

## **Returnees**

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The situation is different for the judiciary. Courts are independent. They don't bear any political responsibility. They don't answer to us citizens. If they need to be called to account, they have to do it themselves.

Do they?

Until very recently, the German administrative courts in many cases couldn't detect a „serious individual threat to life or limb as a result of indiscriminate violence in the context of an international or internal armed conflict“ for civilians in Afghanistan, and thus no right to subsidiary protection under Section 4 (1) no. 3 of the Asylum Act. Among those who were rejected, „adult, single and able-bodied Afghan men“, in any case, were deemed unlikely to be subjected to inhumane treatment in Afghanistan, and therefore, until as late as August 11 the Federal Minister of the Interior finally suspended deportations to Afghanistan, had to expect to be put on a plane and flown to Kabul and thus, as we now know and probably could have known for some time, right into the hands of the Taliban who will most likely be keen to know from those adult, single and able-bodied returnees why they had defected to the infidels instead of taking up arms for Allah.

The level of danger for a particular person in a particular place is not a legal question, but a factual one. And these facts are for the court to determine. It is a lot to ask of an administrative judge in Ansbach to make a prognosis about how dangerous the situation would be for a certain person in a certain corner of Nangarhar. But she can draw on a wealth of sources of information; the German Foreign Office and EASO know all sorts of things, as do UNHCR and the human rights NGOs, although these reports constantly become outdated, and the whole business remains laborious and error-prone. Some would prefer it if the Federal Administrative Court in Leipzig could make central „Länderleitentscheidungen“ on the respective threat levels in various countries, similar to what exists in Great Britain, but this idea has not gained much traction in German politics so far.

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What a judge makes of the evidence, however, is largely up to her. The principle of the free evaluation of evidence applies, and according to the usual formula, a judge oversteps the limits of this principle only if she ignores circumstances whose relevance to the decision should have been obvious to her („deren Entscheidungserheblichkeit sich ihr hätte aufdrängen müssen“). Does this apply to the research of the ethnologist Friederike Stahlmann who, in a 354-page expert opinion in 2018, summarized the fate awaiting returnees in Afghanistan as follows?

Returnees have already made this choice (for which side they want to work and fight) by fleeing, betraying their country and their religious duty from the Taliban's point of view and deliberately evading the Taliban's claim to power, preferring to risk their lives instead of fighting on the Taliban's side in order to place themselves under the protection of the infidels. The flight to Europe is thus an act of political resistance. The religious legitimization around the fight for the Islamic Emirate also ensures that this enmity is defined in religious terms. As a consequence, all those who are perceived as opponents are in mortal danger of being declared apostates, spies or even foreigners. (S. 310)

The European Asylum Support Office (EASO) in Valetta, an EU agency which gathers information for the asylum authorities of member states, published a report – based also on Stahlmann's research – about „Afghan nationals perceived as Westernized“ in September 2020:

In their August 2018 report, the UNHCR noted that '[t]here are reports of individuals who returned from Western countries [to Afghanistan] having been threatened, tortured or killed by AGEs [Anti-Government Elements] on the grounds that they were perceived to have adopted values associated with these countries, or they had become "foreigners" or that they were spies for or supported a Western country.' The same source indicated that the following individuals could be additionally seen as Westernised by the AGEs: humanitarian and development workers, and women in public sphere.

If one were to actually conclude that seeking refuge in Europe is perceived by the Taliban as an individual reason for persecution, then all Afghan applicants would be entitled not just to subsidiary protection but actually to the full asylum status. Assuming that the judiciary did not want to take the responsibility for such a far-reaching decision, wouldn't that even be understandable?

On the other hand, what are the courts independent for, un-harassed by us voters and citizens as they are, if not for being able to stop a deportation when the facts warrant it?

## The week on Verfassungsblog

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Tomorrow marks the 20th anniversary of the terrorist attacks of **September 11, 2001**. As a kick-off event for our chain of online symposia that we plan to hold over the next few months in cooperation with the Society for Civil Liberties (GFF) and sponsored by the Federal Agency for Civic Education, we held a lunchtime talk today with three great

guests – EVA PILS, ANJA MIHR and STEPHAN DETJEN, moderated by our own MARLENE STRAUB – and discussed the consequences of the attacks on the legal and constitutional order in the national, European and global context.

**Afghanistan's 2004 constitution** is considered by some to be partly to blame for the collapse of the political system. SHAMSHAD PASARLAY disagrees: Despite its shortcomings, the constitution could have worked if the political will had been found in time to fix them.

Meanwhile in Germany, the CDU/CSU's election platform contains an asylum law demand whose explosiveness is not immediately apparent: a „small list of **safe countries of origin**“ that establishes a presumption of security only for refugee protection determined by EU law and for subsidiary protection. For RHEA NACHTIGALL, this conceals an unconstitutional attempt to circumvent the *Bundesrat*'s opposition to an expansion of the list of safe countries of origin.

„**Give nature rights!**“ demands a petition for a referendum in Bavaria, which seeks to include rights for nature in the Bavarian state constitution. ELENA SOFIA EWERING and ANDREAS GUTMANN believe this is constitutionally doable and a great opportunity for further development of the law.

With the federal election only days away, fear of **fake news** and disinformation is growing in Germany. SEBASTIAN GOLLA warns against seeking the antidote in new criminal laws.

Lawyers have a key role to play in the fight against climate change. SASKIA STUCKI, GUILLAUME FUTHAZAR, TOM SPARKS, ERIK TUCHTFELD and HANNAH FOEHR call for them to join the **World Lawyer's Pledge on Climate Change**.

Our online symposium „**To Break Up or Regulate Big Tech**“ on the EU Digital Legislative Package has entered its second and final week and concluded with contributions from CATALINA GOANTA, JENS-UWE FRANCK and MARTIN PEITZ, HANNAH RUSCHEMEIER, PADDY LEERSEN and RUTH JANAL.

As announced last week, there's something special to watch starting this Sunday at 6pm here. Don't miss it!

That's it for this week. All the best to you, please support us on Steady or via Paypal, and stay healthy, vaccinated or recovered!

Max Steinbeis

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